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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 394.

CULLEN HUCKABY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

REPLY MEMORANDUM TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION.

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This reply memorandum is necessary to correct several errors in the Government's Memorandum in opposition.

First: In the last paragraph on page 2 in said Memorandum, it is stated that the agents observed the petitioner carrying large bales of sugar. The testimony of the agent (RA 7b) is that petitioner was carrying a "large bale or sack" and that the agent "had no doubt that the bag contained sugar."

Second: It is then stated that "which indicated that they were fermenting mash." There is nothing of the kind in the record.

Third: Following the above, the statement is made, "On the basis of these observations, the agents obtained a search warrant." This statement is clearly erroneous. The affidavit for the search warrant states that, on three occasions, the agent, walking on the sidewalk, "detected the odors of fermenting whiskey mash emanating from" petitioner's home. And this is identical with the agents' testimony in court (RA[1] 3b-4b, 17b-18b). This is an important point. The affidavit is not based on what the agents observed, but upon what they claim to have smelled when it was impossible for them to have smelled anything because (1) the wind was blowing from the agents to the petitioner's home, and (2) the "mash," composed of sugar, water and yeast, gave off only a minimal odor not discernible out of the room in which the container of the mash was located (JA 14a-17a).

Fourth: In the second paragraph on page 3, it is stated that petitioner's claim is based on assertions that the direction of the wind negated the claim of the agents that they smelled mash. Equally important—petitioner's claim is also based on the fact that there was nothing for the agents to have smelled irrespective of the direction of the wind. This fact the Government ignores, but mentions that "airport weather records showed wind direction. * * *" On page 4, to rebut the weather records, the Trial Judge is quoted saying, "out at the airport" and "the whole point about what the wind was a couple of years later." The direction and velocity of the wind was determined "in" at the Detroit City Airport Observatory (Exhibit C, JA 34a) which is not far from petitioner's home in the same northern area of Detroit.

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[1] "RA" refers to the Government's appendix in the Court of Appeals in Case No. 17.

The point to all of this is that the Government seeks to rebut the facts of the direction and velocity of the wind—but ignores completely the fact that the so-called "mash" gives off very little odor. Consequently, it should be taken as an admitted fact that there was nothing whatever that the agents could have smelled—irrespective of the direction of the winds.[2]

Fifth: The loose nuts had nothing to do with October, 1967, when Levett, an electronics expert, tested petitioner's telephone lines and found that a wire tap was on them (JA 29a). The loose nuts were found in petitioner's telephone terminal on March 3, 1968. A call had been made to petitioner informing him that Levett was coming to his home to test the telephone. A short time later, Levett arrived and found that the telephone was completely dead. Checking the wires, Levett found that the nuts in the terminal were loose. He tightened the nuts and restored the telephone to use. Also, the "loose nuts" had nothing to do with October and November, 1964. Beyond any doubt, the telephone call informing petitioner that Levett was coming to petitioner's home had been monitored. And then, someone removed a tap from petitioner's telephone terminal in such haste that he failed to tighten the nuts.

Sixth: In footnote 3 on page 3, it is stated that Agent Turner "received reliable information" that a still was in the house. "Reliable information" means a wire tap. If there had been an informer in the picture, Turner would have said that he had "received information from an informer who had been found to be reliable."

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[2] The trial court also ignored the fact that the composition of the mash precluded there being any discernible odors—confining himself to seeking to rebut the direction of the winds. The Government introduced no evidence whatever to rebut the testimony that the "mash" gave off but little odor.

It follows that the testimony of the agents was palpably false. Without such testimony, there was no evidence in the case—only an inference on an inference. The verdict of the jury was not supported by any evidence.

The only way the agents could have located the still was by information obtained from electronic surveillance.

The Department of Justice has not answered whether there was electronic surveillance or not, but states, "it has found no indication that any such device was employed."

It is true that "no indications" can be found because the records of the agents have been destroyed, except such records as are identical with the testimony of the agents. The Government asserts that there is no evidence in support of petitioner's accusation that agents destroyed records. However, the Government does not state that the records were not destroyed as a matter of fact.

If the Government had examined the records, the fact of the destruction of records would have been known to the Government.

In answer to a motion, Howard E. O'Leary, Esquire, Assistant United States Attorney, produced the records at a meeting in his office in the Federal Building in Detroit, Michigan, at 3:00 o'clock, P.M., on Monday, February 26, 1968, and, in the presence of Orville J. Turner, an agent, explained the paucity of the records by stating that the rest of the records had been destroyed in the course of their regular procedures.

If the Department of Justice had sought information about wire taps, the fact of the destruction of the records would be known to it.

Consequently, it would appear that no effort has been made to answer the question whether or not the agents indulged in electronic surveillance.

Petitioner respectfully requests that the Department of Justice answer whether there was or was not electronic surveillance of petitioner.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES EASLY,

Counsel for Petitioner.